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In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

SCHMIDT PRITCHARD & CO., MANGANO CYCLES CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered in the above case on July 20, 1960.

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (App. A, *infra*, pp. 27–44) is not yet reported. The opinion of the Customs Court (C.D. 2029) is reported at 41 Cust. Ct. 108.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on July 20, 1960 (App. A, *infra*, pp. 44–45). The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether, under Section 350(a) of the Tariff Act of 1930, as amended, and Section 7(c) of the Trade Agreements Extension Act of 1951, as amended, the President has discretion to modify, as well as to accept or reject, Tariff Commission recommendations with respect to escape-clause action.

STATUTES AND PROCLAMATION INVOLVED

The pertinent portions of Section 350 of the Tariff Act of 1930, as added by the Reciprocal Tariff Act of 1934, 48 Stat. 943, as amended, 19 U.S.C. 1351; Section 7 of the Trade Agreements Extension Act of 1951, 65 Stat. 74, as amended, 19 U.S.C. (1952 ed., Supp. I) 1364; amendments subsequent thereto; and Proclamation No. 3108, 70 Stat. C4, are set forth in Appendix B, *infra*, pp. 46–53.

STATEMENT

Respondents instituted this action under Section 514 of the Tariff Act of 1930, 46 Stat. 734, as amended, 19 U.S.C. 1514, to contest the assessment of duty upon certain large-wheel, lightweight bicycles which had been imported (R. 6).* The Collector of Customs assessed duty in accordance with paragraph 371 of the Tariff Act of 1930, as modified by Presidential Proclamation No. 2761A, of December 16, 1947,[1] *and* as further modified by Presidential Proclamation No. 3108, of August 18, 1955 (R. 7, 8, 39; Ex.

* "R." refers to the Transcript of Record in the United States Court of Customs and Patent Appeals, filed as page 1 of the record in this Court.

[1] 61 Stat. (Part 2) 1103; 82 Treas. Dec. 305, T.D. 51802.

1, p. 1).[2] Respondents asserted that Presidential Proclamation No. 3108 was "illegal, null and void" and therefore that the bicycles were properly dutiable at the lower rates provided in paragraph 371 of the 1930 Act as modified by Proclamation No. 2761A alone (R. 6; Ex. 1, p. 1). The relevant facts are undisputed.

1. *Escape-clause action taken by the Tariff Commission and the President with respect to bicycles.* On June 14, 1954, the Bicycle Manufacturers Association of America filed an application with the Tariff Commission for an investigation under Section 7 of the Trade Agreements Extension Act of 1951 (the escape-clause provision), 65 Stat. 74, as amended, 19 U.S.C. 1364, App. B, *infra,* pp. 46 *ff.*, with respect to bicycles (Ex. 1, pp. 1–2). The application asserted that increased importations of bicycles due to the lowering of duty rates by Presidential Proclamation No. 2761A in 1947, *supra* (issued in pursuance of Section 350(a) of the Tariff Act of 1930 as added by Section 1 of the Reciprocal Tariff Act of 1934, 48 Stat. 943, as amended, 19 U.S.C. 1351(a)), had caused or threatened to cause serious injury to the domestic bicycle industry. The Commission thereupon instituted an investigation[3] during the course of which it held a public hearing.[4]

On March 14, 1955, the Commission reported to the President that, based upon its investigation, all

[2] 70 Stat. C4; 90 Treas. Dec. 285, T.D. 53883.

[3] By order of Investigation No. 37. R. 43; Exhibits 1, 2–A.

[4] R. 43. Public notice of the hearing was given. See *e.g.*, 19 Fed. Reg. 4287.

of the commissioners except Commissioner Sutton had concluded that:

> (1) As a result in part of the duties reflecting concessions granted thereon in the General Agreement on Tariffs and Trade, bicycles * * * are being imported into the United States in such increased quantities, both actual and relative, as to cause serious injury to the domestic industry producing like or directly competitive products.[5]

Three commissioners, a majority, recommended specific duties within limits of "not less than 22½ percent nor more than 30 percent" on all bicycles regardless of size.[6] Commissioner Edminster differed with the majority as far as large-wheel, lightweight bicycles were concerned, concluding that the then existing 7½ percent differential between balloon-tire and lightweight bicycles should be retained so that the duty on the lightweights would be not less than 15 nor more than 30 percent *ad valorem*.[7]

On May 11, 1955, the President sent a letter to the Chairman of the Tariff Commission requesting, by July 15, 1955, answers to certain specific questions so that he could have "at hand the most recent in-

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[5] United States Tariff Commission, *Bicycles (1955), Report to the President on Escape-Clause Investigation No. 37*, pp. 1–4. A copy of this document is a part of the record herein, Exhibit 3. It is hereinafter referred to as "Report, Investigation No. 37."

[6] *Id.* at 5.

[7] *Id.* at 24–30. Commissioner Sutton dissented on the ground that there was insufficient evidence to indicate that the bicycle industry was suffering from the requisite "serious injury or the threat thereof." *Id.* at 31–41.

formation and fullest analysis obtainable."[8] On the same date (May 11, 1955), the President, acting in conformity with Section 7(c) of the Trade Agreements Extension Act of 1951, as amended, 19 U.S.C. 1364 (App. B, *infra*, p. 48), wrote to the chairmen of the House Committee on Ways and Means and the Senate Committee on Finance, advising them that he had not put the Commission's recommendations into effect because he was "remanding this case to the Commission for further information" (R. 36–37).

The Commission reported to the President on July 14, 1955, in response to his request for supplementary information.[9] In this report the Commission majority

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[8] Exhibit 2-C. The President noted that the "data in the report upon which the Commission based its findings and recommendations do not extend beyond the end of 1954," and asked "for additional data extending as far as possible into 1955" and also for the Commission's "considered judgment as to the industry's prospects for the remainder of the year * * *." The letter stated that "[t]his information is essential in order to gain a clearer idea as to whether the decline in domestic bicycle production in 1954 was the beginning of a persistent trend or only a temporary variation such as the Commission's report indicates the industry has experienced in the past."

[9] *Supplementary Report to the President on Escape-Clause Investigation No. 37*, hereinafter referred to as "Supplementary Report, Investigation No. 37." A copy of this document is a part of the record, Exhibit 4.

The Supplementary Report (p. 2) stated that it was based on information collected by way of questionnaires executed by the major domestic manufacturers and major importers of bicycles, visits by members of the Commission's staff with practically all the recipients of such questionnaires, a canvass by members of the staff of as many retail bicycle dealers as possible in the time allotted, reexamination of pertinent materials

concluded that, on the basis of the additional evidence recited therein, "injury to the domestic bicycle industry from imports * * * has been substantially increased and intensified in the first five months of 1955."[9] They made no other conclusional comment and did not attempt expressly to reiterate or reaffirm the recommendations made in the report of March 14, 1955."[10]

On August 18, 1955, the President issued Proclamation No. 3108 (App. B, *infra*, pp. 50–53). "[A]cting under the authority vested in [him] by Section 7(c) of the Trade Agreements Extension Act of 1951, and in accordance with the provisions of Article XIX of the General Agreement on Tariffs and Trade (GATT)," he stated that modification of the GATT concessions on bicycles was "necessary to remedy the serious injury to the domestic industry producing like or directly competitive products," and proclaimed increases in the rates of duty prescribed by those concessions. For type and size classifications other than large wheel lightweights, he put into effect the modifications recommended by the Tariff Commission in its report of March 14, 1955 [see *supra*, pp. 3–4].

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in the Commission's files and obtaining additional data from other Government agencies. No public hearings were held in connection with the Commission's efforts to bring the information up to date.

[9] Supplementary Report, Investigation No. 7[illegible], p. 2.

[10] Commissioner Sutton again dissenting. Commissioner Talbot, who did not participate in the original investigation, left the Commission on June 16, 1955. His successor, Commissioner Jones, took the position as he had not been present at the original hearings [illegible].

large-wheel lightweights, he increased the specific duty per unit and the *ad valorem* limitations (to "not less than 11¼% nor more than 22½% ad val."), but did not effectuate the full increase recommended by the Tariff Commission.

On the same date the President wrote to the chairmen of the House Committee on Ways and Means and the Senate Committee on Finance (Exhibit 5), stating (at p. 4) that he agreed with the majority of the Tariff Commission

> that the American bicycle industry has, within the meaning of the law, suffered serious injury or the threat of serious injury from increased imports resulting in part from tariff concessions.

He added:

> As to the remedy that should be applied, however, I differ with the majority of the Commission. The purpose of this letter is to inform you of my reasons for this difference.

The letter went on to explain that, whereas the Tariff Commission had the responsibility to consider only "the question of injury and relief to a domestic industry within the meaning of the law," the President was obligated to weigh, in addition, several "other fundamental questions bearing on the security and well-being of 165,000,000 Americans." It further indicated that the President had considered "not only the Tariff Commission's two reports, but also the views of interested Departments and Agencies of the Executive Branch and other relevant and available information," in reaching his conclusion.

2. *The decision of the Customs Court.* The Customs Court agreed with respondents that Presidential Proclamation 3108 was invalid for two principal and independent reasons. First, the court ruled the Proclamation invalid because of a failure to follow what it considered to be jurisdictional procedural requirements of Section 7 of the Trade Agreements Extension Act of 1951, 65 Stat. 74, as amended prior to the issuance of the Proclamation, 19 U.S.C. 1364 (1952 ed., Supp. III).[12]

Secondly, the majority of the Customs Court agreed with respondents' contention that the President by proclaiming a change in duty different from that recommended by the Tariff Commission exceeded his discretion. This holding was based on the theory that Section 7(e) (App. B, *infra*, p. 48) limits the President's discretion in acting upon the Commission's report to acceptance or rejection of the specific reme-

[12] As the Court of Customs and Patent Appeals disagreed with the Customs Court's holding on this portion of the case, we need treat it no further here. However, for the Court's information we list the procedural errors found by the Customs Court: (1) If the Commission's supplemental inquiry is to be considered a continuation of the bicycle investigation undertaken as a result of the June 14, 1954, application (see *supra*, p. 3), the Commission's supplemental report of July 14, 1955, was invalid as it was not submitted to the President within the nine months then required by Section 7(a); and (2) if the supplemental inquiry be considered a new investigation, it was invalid "for lack of public notice and public hearings" required by Section 7(a). The Customs Court did not consider respondents' further contention that Section 7(e) authorized the President to issue his proclamation only within sixty days of the Commission's March 14, 1955, report, and that his attempt to do so after the expiration of that period was of no effect.

dies recommended by it. In reaching this conclusion, the court stated (R. 50):

> It is of historic significance and importance that when Congress has intended to endow the Chief Executive with power and authority to exercise independent judgment designed to modify the tariff structure it has done so in clear and explicit terms.

It went on to discuss several such provisions in respect to which the President's power or lack of power to modify the recommendations of his advisers was thought to be clearly settled (R. 50–56). The court concluded (R. 56):

> The foregoing considerations based upon references to statutes in *pari materia* lead inescapably to the conclusion that section 7(c) of the extension act * * * in terms directs the president to make the adjustments or modifications found and reported *by the Tariff Commission*, or to reject them. [Emphasis in original.]

In dissenting on this issue, Judge Ford pointed out that, under a proper construction of the statutory wording, the President can modify, as well as accept or reject, the Commission's findings. He added (R. 65):

> It is my firm belief that Congress did not intend to tie the hands of the President when it granted to him this broad power. This belief appears to be affirmed when the legislative history of the escape clause provision is considered.

3. *The decision of the Court of Customs and Patent Appeals.* The Court of Customs and Patent Appeals, while disagreeing with the Customs Court on the procedural questions, *supra*, p. 8, n. 12, affirmed its holding as to the want of power in the President to take any escape-clause action except that recommended by the Tariff Commission. App. A, *infra*, pp. 37–44. The court noted that "section 7 of the Trade Agreements Extension Act of 1951 is primarily a procedural statute," but went on to hold that it, Section 7, is the source of the President's power to take escape-clause action and places "limits on the Presidential exercise of the therein delegated powers. He is authorized only to accept or reject the recommendations of the Tariff Commission made pursuant to this section." The court reached this conclusion upon what it termed the "clear and unambiguous" language of Section 7 and the "result which is * * * reasonable and consistent with the overall purposes expressed in other sections of the Act" and supported by its legislative history.

REASONS FOR GRANTING THE WRIT

This case calls for review by this Court because the decision below improperly interferes with Presidential powers in the important area of tariffs and foreign trade. The Court of Customs and Patent Appeals has invalidated a tariff proclamation of the President issued under the authority of Congress' trade agreement legislation, as that authority has been construed by the President. The court's holding has the effect of invalidating not only the proclamation at issue in this case, but also three others

Proclamation No. 3059, issued June 30, 1954, 68 Stat. (Part 2) C44; Proclamation No. 3100, issued June 29, 1955, 69 Stat. C38 (concerning alsike clover seed); and Proclamation No. 3211, issued November 9, 1957, 22 Fed. Reg. 9043 (concerning spring clothespins); it also throws doubt on the validity of Proclamation No. 3257, issued September 22, 1958, 23 Fed. Reg. 7475 (concerning lead and zinc).[9] This rejection of Presidential action is based on the erroneous holding that the President's only discretion was either to accept or reject the Tariff Commission's recommendation as to escape-clause action. Contrary to the view of the court below, Section 7 of the Trade Agreements Extension Act of 1951, 19 U.S.C. 1364, was not intended as a limitation upon the substantive power of the President—conferred by Section 350(a) of the Tariff Act of 1930—to issue any proclamation "required or appropriate to carry out any foreign trade agreement," including those containing an escape-clause authorizing the contracting party "to suspend * * * in whole or in part or to withdraw or modify the concession." Under this authority, the President could accept, reject, or modify the Tariff Commission's recommendations. His power has been so understood both by the President and by the Congress. The contrary position of the court below should not be permitted to stand.

1. The President has power to issue proclamations modifying duty rates by virtue of Section 350(a) of

[9] But see subsection (2)(B) added to Section 7(c) by the Trade Agreements Extension Act of 1958, 72 Stat. 676, 19 U.S.C. 1364(c)(2)(B), discussed *infra*, pp. 25-29.

the Tariff Act of 1930, App. B, *infra*, p. 46. This section authorizes the President, whenever he enters into a foreign trade agreement,[14]

> To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, *as are required or appropriate to carry out any foreign trade agreement* that the President has entered into hereunder. * * * [Emphasis added.][15]

Thus empowered, the President, on October 30, 1947, entered into the General Agreement on Tariffs and Trade, 61 Stat. (Part 5) (GATT), in which he agreed to a lower duty rate on bicycles (among other rates). GATT also contained a provision (called the escape clause) allowing the United States "to suspend" a concession *"in whole or in part* or to withdraw *or modify* the concession," when any product, because of the concession, is being imported into the United States "in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers * * * of like or directly

[14] The President is authorized to enter into foreign trade agreements "whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States * * *." Section 350(a), App. B, *infra*, p. 46.

[15] Although the President's authority to proclaim modifications of customs duties has been revised from time to time, in some particulars, the basic authority delegated by the above-quoted wording has remained unchanged.

competitive products." Art. XIX, par. 1(a), 61 Stat. (Part 5) A58–A59 (emphasis added).

The effectuation of any escape-clause action, like the effectuation of the tariff concession itself, was to be by the President acting under his congressional grant of authority in Section 350(a) to "proclaim such modifications" of duties "as are required or appropriate to carry out any foreign trade agreement." It is significant that, though escape-clauses were included in "all trade agreements * * * signed since 1943,"[16] Congress first specifically mentioned the escape-clause, as part of the statutory scheme, in the Trade Agreements Extension Act of 1951, App. B, *infra*, p. 46 *ff*. In that Act, however, Congress did not purport to bestow any authority upon the President to proclaim duty modifications under the escape-clause, nor did Congress purport to limit the authority to proclaim such modifications already granted the President in Section 350(a). Rather, the legislative history of Section 7 of the 1951 Act shows that the only intent of Congress, in the words of the Senate Committee on Finance, was that "escape action taken, shall be administered under the *procedures* provided in section 7 * * *." S. Rept. No. 299, 82 Cong., 1st Sess., p. 6 (emphasis added). The Committee went on to state that "[t]he import quotas to be applied under section 7 are only such as are contemplated and authorized by section 350 of the Tariff Act of 1930,

[16] H. Rept. No. 14, 82d Cong., 1st Sess., p. 13.

as amended." *Ibid.*[17] See also H. Rept. No. 537, 82d Cong., 1st Sess., p. 4; H. Rept. No. 1761, 85th Cong., 2d Sess., p. 5; Hearings before the Committee on Ways and Means, House of Representatives, 83d Cong., 1st Sess., on H.R. 4294, p. 1952.

The court below ignored this distinction between the President's substantive power and the procedure by which he was to exercise it, in holding that both the source and the limitations of Presidential power were to be found within the precise words of Section 7.

2. The issuance of an escape-clause proclamation has the effect of modifying the terms of one or more trade agreements. As such, the proclamation bears directly upon the relations of the United States with other nations and involves an exercise by the President of power which is peculiarly within the competence of the Executive. For under the Constitution the President is "the sole organ of the federal government in the field of international relations * * *." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319–20. See also, *United States* v. *Belmont*, 301 U.S. 324, 330; *United States* v. *Pink*, 315 U.S. 203, 222–23, 229–30; *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109; *Ludecke* v. *Watkins*, 335 U.S. 160, 173; *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542.

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[17] While the Committee referred only to the imposition of quotas, it is apparent that the source of the President's authority to take escape-clause action is the same no matter which device (*i.e.*, quota or increased duty) he uses to effectuate this authority.

This constitutional fact—that the President acts under Section 350(a) both to implement the policy determinations of Congress *and* as the sole authority in whom the conduct of foreign affairs is vested—gives rise to the presumption that Congress did not intend to limit his discretion to acceptance or rejection of the recommendations made by the Tariff Commission under Section 7.[18] This strong presumption is underscored in this case by the President's recognition, in issuing Proclamation No. 3108, that delicate questions concerning our foreign relations are involved when unilateral escape-clause action is taken. In his letter of August 18, 1955, to the chairmen of the two congressional committees concerned, advising them of the reasons for his disagreement with the majority of the Commission on the proper rate of increase in the rate of duty for large-wheel lightweights,

[18] As pointed out by this Court in *United States* v. *Curtiss-Wright Corp.*, *supra*, 299 U.S. at 319-21 (emphasis added):

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. * * *

* * * * *

"When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, *the legislator properly bears in mind the important consideration that the form of the President's action*—or, indeed, whether he shall act at all—*may well depend*, among other things, * * * *upon the effect which his action may have upon our foreign relations.*"

the President stated (Ex. 5, p. 4) that, among other things, he had necessarily considered

> the question of compensation under our trade agreement commitments to nations affected by the withdrawal of certain tariff concessions previously granted by us.

There are, in addition to factors incident to the proper conduct of foreign relations, many other elements which the President must take into consideration before reaching a decision as to the changes, if any, in customs treatment which are warranted in giving escape-clause relief. This was expressly recognized by the House Committee on Ways and Means in the 84th Congress.[19] The Committee also confirmed the view advanced here—that, in light of the fact that the President's standard for *action* involves consider-

[19] In reporting out H.R. 1, which became the Trade Agreements Extension Act of 1955, the Committee observed that (H. Rept. No. 50, 84th Cong., 1st Sess., p. 4):

"In making his determination whether to withdraw or modify a concession, the President must take into account all relevant factors, including our national-defense requirements, requirements for carrying on successfully the foreign relations of the United States, and the necessity for maintaining and strengthening the domestic economy of the United States. Consequently, he secures the individual views of the Departments of Agriculture, Commerce, Defense, Interior, Labor, Treasury, and State and the Foreign Operations Administration, in order that his decision whether to withdraw or modify the concession may be based upon all the information available in the Government. The Departments of Agriculture, Commerce, Interior, and Labor have primary responsibility for providing economic information and views relating to domestic activity, while the other agencies submit data and views concerning the other factors."

ations so much more complex than the Commission's standard for *recommendation*, the President was intended by Congress to have full discretion to accept, reject, or modify the Commission's recommendations." See also *infra*, p. 19, *et seq.*

The President's August 18, 1955, letter to the two committee chairmen (Exhibit 5) indicated that his determination to modify the Commission's recommendation with regard to large-wheel lightweights was the result of just such a weighing of "factors relating to the national interest." He noted at the outset that "in 'escape clause' cases such as this, several issues of a fundamental kind are involved." He then went on to state that, in addition to the pervasive question of the effect of escape-clause action on our foreign trade-agreement commitments:

> There is the question of injury and relief to a domestic industry within the meaning of the law.
>
> There is the question of our national security interest in the economic strength of valued allies in the free world.

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[9] It stated (*id.* at 4–5):

"The committee believes that the President should give full consideration to the Tariff Commission's findings regarding injury. * * * The other factors, relating to the overall national interest, are, of course, outside the jurisdiction of the Tariff Commission, and must be weighed by the President after receiving the views of the various departments. The committee is of the opinion that a President, who has the authority to determine where and when American Armed Forces may be employed in the Formosa Straits in the interest of our national security, can be trusted to weigh factors relating to the national interest in terms of withdrawing a tariff concession."

> There is the question of building export markets for the products for our farms, factories and mines.
>
> * * * * *
>
> There is the question of protecting the American consumer against unnecessary and unjustified price increases.

And he concluded:

> The Tariff Commission has the responsibility with respect to the first of these questions: to investigate and report to the President any finding of serious injury or threat of serious injury within the meaning of the law.
>
> The President has the responsibility of considering, not only the question of injury to a domestic industry and measures recommended for its relief, but also the other fundamental questions bearing on the security and well-being of 165,000,000 Americans. The President's final judgment in each case must represent the best composite evaluation he can make of these questions.

That the Tariff Commission is not called upon to take into account the numerous factors alluded to by the President is seen from Section 7, which provides in relevant part that:

> Should the Tariff Commission find * * * that a product on which a concession has been granted is, as a result * * * of the duty or other customs treatment reflecting such concession, being imported in such increased quantities * * * as to cause or threaten serious injury to the domestic industry producing like or directly competitive products, it shall recommend to the President the withdrawal or modi-

> fication of the concession * * * to the extent and for the time *necessary to prevent or remedy such injury* [emphasis added].

Under this authorization, the duty of the Commission is to focus its attention on one single consideration, namely, what action is "necessary to prevent or remedy such injury."[a]

In sum, the court below has ignored the essentially different roles of the President and the Tariff Commission insofar as escape-clause action is concerned. The scope of the President's inquiry is much broader. While the recommended change in customs may seem appropriate when examined solely in terms of the particular factors which were appraised by the Commission, the myriad other factors to be weighed by the President may well dictate the conclusion that a somewhat different concession modification is warranted. In such circumstances it cannot be that the President is nevertheless under a congressional mandate to choose between total acceptance or total rejection of the Tariff Commission recommendations. Whichever of these polar alternatives were to be pursued, either the domestic industry or some other vital American interest would be adversely and unnecessarily affected.

3. The holding below elevates the Commission to a plane never contemplated by Congress. The Commission now has power, it is held below, to make recommendations which mold the scope of the President's

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[a] Nor, in the opinion of present members of the Commission, is it equipped to take any considerations of "a broad policy nature into account. Hearings before the Committee on Ways and Means, House of Representatives, 85th Cong., 2d Sess., on Renewal of the Trade Agreements Act, Part 1, pp. 194–197.

discretion. Such power is, at least by indirection, a policy-controlling weapon which is directly in conflict with the historic function of the Commission. The Tariff Commission was established by the Act of September 8, 1916, 39 Stat. 795, and vested solely with *fact-finding* authority. Section 1 of that Act specifically provided that "not more than three of [the six commissioners] shall be members of the same political party * * *." The Attorney General early held that its powers were "limited to the ascertainment and report of facts." 34 Ops. Atty. Gen. 77, 79.

That the Commission is intended to fulfill this same role in its escape-clause investigations and reports is demonstrated by the legislative history of the Trade Agreements Extension Act of 1953. H.R. 4294, 83d Congress, 1st Sess., would have removed all discretion from the President in escape-clause proceedings under Section 7. It would have amended Section 7(c) to provide that the President must effectuate the tariff charges recommended by the Commission. This bill was not reported out of committee and never reached the House floor. Among the numerous objections to the bill was the fact that it would have converted the Tariff Commission into a policy-making body. The Commission, in a memorandum to the House Committee on Ways and Means (Hearings before the Committee on Ways and Means, House of Representatives, 83d Cong., 1st Sess., on H.R. 4294, pp. 1963–1964), pointed out the radical departure from precedent that would have resulted:

> Fact-finding functions in connection with prescribed formulas for changing duties by execu-

tive action were first given to the Tariff Commission in 1922. In all instances since then where Congress has delegated power to change import duties by Executive action [the Commission has] been placed in the role of a fact-finding advisory agency whose determinations and recommendations are to be submitted to the President, who is given complete discretion in the matter of making changes in import restrictions within the limits authorized by the statute. The reason for giving the Commission the fact-finding functions was presumably because the Commission was established in 1916 primarily as a research agency, to gather information for the use of Congress and to assist it in carrying out its constitutional function of regulating foreign trade. Thus, the power delegated to the President to change import duties under specified conditions has always carried with it complete statutory discretion, the Tariff Commission playing the role of the expert body to assist and advise the President in carrying out his statutory functions. H.R. 4294 would change this formula for exercising delegated authority to change import duties by making the Tariff Commission's findings determinative as to whether a change in import restrictions should be made. The President would have only the ministerial function of proclaiming the change in import duties which the Tariff Commission specified in a report to him.

This Court has recognized that "[s]ince its creation in 1916 the Commission has acted *as an adviser to the Congress or to the President*" (emphasis added).

United States v. *Bush & Co.*, 310 U.S. 371, 379. See also *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 310; *Hampton & Co.* v. *United States*, 276 U.S. 394, 405. An adviser, of course, does not dictate the alternatives which are open to the person he advises.

In order to find that Congress had converted the Tariff Commission into something more than the nonpartisan, fact-finding, advisory body which it has historically been, there would have to be an explicit and clear intention to do so. Such a purpose does not appear in the legislative history of Section 7. And certainly an intention to vest an administrative body like the Tariff Commission with authority to control this nation's foreign relations and over-all national interests is not lightly to be imputed. Compare *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103.

4. Proclamation No. 3108 is not the only instance in which the President has construed Section 7(c) as not precluding him from taking different escape-clause action than that recommended by the Tariff Commission. He followed such a construction in issuing Proclamation No. 3059, 68 Stat. (Part 2) C44, on June 30, 1954, and Proclamation No. 3100, 69 Stat. C38, on June 29, 1955, effectuating in part only the Tariff Commission's recommendations as to alsike clover seed.[22] Thus, in two instances preceding the issuance of Proclamation No. 3108 on August 18, 1955, the President had construed Section 7(c) in the

[22] Thirty-Eighth Annual Report of the United States Tariff Commission, 1954, pp. 54–55.

same fashion as he did here. Further, since that date he has issued two more proclamations at variance with the Commission's recommendations.[23] This repeated and consistent interpretation of Section 7(c) by the President, who is charged with carrying out its terms, is entitled to great weight on the question as to whether Congress intended the President to have plenary discretion insofar as the Commission's Section 7 recommendations are concerned. *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90; *United States* v. *Zucca*, 351 U.S. 91, 96; *United States* v. *Public Utilities Commission*, 345 U.S. 295, 314–15; *Roland Co.* v. *Walling*, 326 U.S. 657, 676–77; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315.

5. Congress has known and approved the President's consistent interpretation of Section 7(c) as not prohibiting him from modifying the Tariff Commission's recommendations. In enacting the Trade Agreements Extension Act of 1955, 69 Stat. 166, which left Section 7(c) wholly intact, Congress had full knowledge of the President's construction of Section 7(c) as manifested in the first alsike clover seed proclamation. Such congressional action, with respect to a Presidential action of the type, can be said to amount to legislative ratification of that construction.[24]

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[23] Proclamation No. 3211 (November 9, 1957), 22 Fed. Reg. 9043, on spring clothespins; and Proclamation No. 3257 (September 22, 1958), 23 Fed. Reg. 7475, on lead and zinc.

[24] *United States* v. *Allen-Bradley Co.*, 352 U.S. 306, 308–311; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 53; *Allen* v. *Grand Central Co.*, 347 U.S. 535, 544–550; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 310–315.

The details relating to the alsike clover seed proclamation were reported to Congress in the Thirty-Eighth Annual Report of the Tariff Commission, 1954, pp. 54–55. And the President's action was specifically noted by the Committee minority in a report of the House Committee on Ways and Means on the underlying bill. H. Rept. No. 50, 84th Cong., 1st Sess., p. 28.

Following the enactment of the 1955 Act, a Subcommittee on Customs, Tariffs, and Reciprocal Trade Agreements was appointed to inquire, *inter alia*, into the administration of the escape-clause procedure under Section 7. The attention of this subcommittee was called to the fact that the action taken by the President with regard to bicycles had been made the basis of a protest.[25] In its report to the full committee, the subcommittee explained the relationship between Section 350(a) and Section 7(c) set forth above, see *supra*, pp. 11–14, and observed that the President's discretion was not limited by the Tariff Commission's recommendations. In so doing the subcommittee specifically noted that in this case and in the alsike clover seed case the President had "proclaimed smaller increases in duty on the imports involved than those recommended by the Commission."[26]

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[25] Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 84th Cong., 2d Sess., on Administration and Operation of Customs and Tariff Laws and the Trade Agreements Program, Part 1, pp. 343–44, 349–50.

[26] Report to the Committee on Ways and Means from the Subcommittee on Customs, Tariffs, and Reciprocal Trade Agreements, dated March 8, 1957 (Committee Print), pp. 74–75.

The construction of the President and the subcommittee was reconfirmed in the House Committee Report on H.R. 12591, 85th Cong., which was enacted as the Trade Agreements Extension Act of 1958, 72 Stat. 676, 19 U.S.C. 1364(c)(2). More importantly, Congress as a whole considers this interpretation to be correct—as is now apparent on the face of the present statute. The 1958 Act added to Section 7(c) subsection (2)(B), which provides that, whenever the President disapproves of the Commission's escape clause recommendations "*in whole or in part*,"[a] the recommendations shall take effect upon the conclusion of certain prescribed congressional action. The House Committee, in reporting the bill that became the 1958 Act, explained its provisions by stating, *inter alia*, "that the President must *continue to have discretion* in escape clause cases because their effects on foreign relations and other aspects of the national interest may outweigh the benefit to a particular industry."[b] Thus Section 7(c)(2)(B), recognizing that the President may disapprove a Tariff Commission recommendation "in whole or in part," constitutes "a binding and final congressional declaration" that Section 7(c) of the Trade Agreements Extension Act of 1951 (continued verbatim as Section 7(c)(1)) does not preclude modification by the President of a Commission recommendation. *United States* v. *Turner Turpentine Co.*, 111 F. 2d 400, 404 (C.A. 5);

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[a] Emphasis added.

[b] H. Rept. No. 1761, 85th Cong., 2d Sess., pp. 10-12 (emphasis added).

Great Northern Ry. Co. v. *United States*, 315 U.S. 262, 277; *National Labor Relations Board* v. *Drivers Local Union*, 362 U.S. 274, 291–292.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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OCTOBER 1960.

APPENDIX A

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

October Term 1959. Customs Appeal No. 4980.
Customs Calendar No. 8

THE UNITED STATES, APPELLANT

v.

SCHMIDT PRITCHARD & CO., MANGANO CYCLES CO., APPELLEES

SMITH, *Judge*.

Appellees imported bicycles of wheel diameter over twenty-five inches, weighing less than 36 pounds, and not designed for use with tires having a cross-sectional diameter exceeding one and five-eighths inches, which the Customs Collector classified under paragraph 371 of the Tariff Act of 1930, as modified. Duty was assessed at 11¼ percentum ad valorem according to Presidential Proclamation 3108, 70 Stat. C 4, 90 Treas. Dec. 285, T.D. 53883. Presidential Proclamation 3108 purported to modify Proclamation No. 2761A, 61 Stat. (Part 2) 1103, 82 Treas. Dec. 305, T.D. 51802, issued pursuant to the General Agreement on Tariffs and Trade, 61 Stat. (Part 5) A1213, which had set the rate of duty at $1.25 each, but not less than 7½% nor more than 15% ad valorem.

Based upon the allegation that the modification made by Proclamation 3108 is illegal, the importer, acting under section 514 of the Tariff Act of 1930, protested the rate of duty assessed, contending that the duty should have been assessed according to Proc-

lamation No. 2761A. The Customs Court sustained the protest, and held that Presidential Proclamation No. 3108 was illegal, C.D. 2029. The Government appeals from that judgment.

Proclamation No. 3108, the legality of which is here in issue, was issued after an "escape-clause" proceeding had been instituted pursuant to section 7 of the Trade Agreements Extension Act of 1951, as amended. In addition to the formal "escape clause" proceeding under section 7, the President had requested and the Tariff Commission had conducted a supplemental investigation, after which its final recommendations were transmitted to the President and Proclamation No. 3108 was issued.

The record here consists of a stipulation of the parties, a certified statement by the Secretary of the Tariff Commission as to the official records of that Commission pertaining to its Investigation No. 37 with respect to bicycles, and copies of official notices, reports and statements in connection with the Commission's proceedings and Presidential action.

The record establishes the following chronology of events pertinent to the present controversy:

1. On June 14, 1954, an application was filed with the Tariff Commission for an investigation of bicycles under section 7, Trade Agreements Act of 1951, as amended.

2. On June 22, 1954, the Tariff Commission, by Order of Investigation No. 37, instituted an investigation under said section 7, with respect to bicycles. Due notice of such investigation was given.

3. On July 8, 1954, the Tariff Commission ordered a public hearing to be held in said investigation No. 37 on September 21, 1954. Due notice of such hearing was given.

4. On September 21–24, inclusive, 1954, and September 27, 1954, a public hearing was held by the Commission pursuant to said notice.

5. On March 14, 1955, the Tariff Commission submitted a report to the President on its said Investigation No. 37 on bicycles.

6. On May 11, 1955, the President addressed a letter to the Chairman of the Tariff Commission requesting further information and report back to him no later than July 15, 1955.

7. On May 11, 1955, the President addressed a letter to the Chairmen of the Committee on Ways and Means, House of Representatives and Committee on Finance, Senate, advising them he was remanding the case to the Commission for further information.

8. On July 14, 1955, the Tariff Commission submitted a supplemental report to the President on its said Investigation No. 37 with respect to bicycles. No public notice was issued and no public hearing was held in connection with the investigation made to gather the data requested by the President.

9. On August 18, 1955, the President issued Proclamation No. 3108 increasing the rates of duty on bicycles. The increased rates so proclaimed differed in part from the rates found and recommended by the Tariff Commission to the President.

10. On August 18, 1955, coincident with the issuance of said proclamation, the President addressed a letter to the Chairman of the Committee on Finance, United States Senate, and the Chairman of the Committee on Ways and Means, House of Representatives, setting forth reasons for his action in promulgating rates of duty different from those found and recommended by the majority of the Commission.

11. On August 19, 1955, the Tariff Commission issued a statement reporting the action of the President, and the reasons stated by him for his action.

The statutory provisions involved are:

(A) Section 7 of the Trade Agreements Extension Act of 1951, 65 Stat. 74 (19 U.S.C.A., § 1364 [T.D. 52772]):

> SEC. 7. (a) Upon the request of the President, upon resolution of either House of Congress, upon resolution of either the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives, upon its own motion, or upon application of any interested party, the United States Tariff Commission shall promptly make an investigation and make a report thereon not later than one year after the application is made to determine whether any product upon which a concession has been granted under a trade agreement is, as a result, in whole or in part, of the duty or other customs treatment reflecting such concession, being imported into the United States in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive products.
>
> In the course of any such investigation, whenever it finds evidence of serious injury or threat of serious injury or whenever so directed by resolution of either the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives, the Tariff Commission shall hold hearings giving reasonable public notice thereof and shall afford reasonable opportunity for interested parties to be present, to produce evidence, and to be heard at such hearings.
>
> Should the Tariff Commission find, as the result of its investigation and hearings, that

a product on which a concession has been granted is, as a result, in whole or in part, of the duty or other customs treatment reflecting such concession, being imported in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive products, it shall recommend to the President the withdrawal or modification of the concession, its suspension in whole or in part, or the establishment of import quotas, to the extent and for the time necessary to prevent or remedy such injury. Within sixty days, or sooner if the President has taken action under subsection (c) of this section, the Tariff Commission shall transmit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives an exact copy of its report and recommendations to the President.

(b) In arriving at a determination in the foregoing procedure the Tariff Commission, without excluding other factors, shall take into consideration a downward trend of production, employment, prices, profits, or wages in the domestic industry concerned, or a decline in sales, an increase in imports, either actual or relative to domestic production, a higher or growing inventory, or a decline in the proportion of the domestic market supplied by domestic producers.

(c) Upon receipt of the Tariff Commission's report of its investigation and hearings, the President may make such adjustments in the rates of duty, impose such quotas, or make such other modifications as are found and reported by the Commission to be necessary to prevent or remedy serious injury to the respective domestic industry. If the President does not take such action within sixty days he shall immediately submit a report to the Committee

on Ways and Means of the House and to the Committee on Finance of the Senate stating why he has not made such adjustments or modifications, or imposed such quotas.

(d) When in the judgment of the Tariff Commission no sufficient reason exists for a recommendation to the President that a concession should be withdrawn or modified or a quota established, it shall make and publish a report stating its findings and conclusions.

(B) The 1953 amendments to Section 7 of the Trade Agreements Extension Act of 1951 (Trade Agreements Extension Act of 1953, 67 Stat. 472 [T.D. 53326], Section 102):

SEC. 102. TIME FOR CERTAIN REPORTS BY TARIFF COMMISSION.

The first paragraph of subsection (a) of section 7 of the Trade Agreements Extension Act of 1951 (19 U.S.C., sec. 1364) is hereby amended by striking out "one year" and inserting in lieu thereof "nine months". In the case of any application made under such first paragraph before the date of the enactment of this Act, the United States Tariff Commission shall make its report not later than whichever of the following is the earlier: (1) one year after the application was made, or (2) nine months after the date of the enactment of this Act.

(C) The 1955 amendments to Section 7 of the Trade Agreements Extension Act of 1951 (Trade Agreements Extension Act of 1955, 69 Stat. 166 [T.D. 53833], Sections 5 and 6):

SEC. 5. The last sentence of subsection (a) of section 7 of the Trade Agreements Extension Act of 1951, as amended (19 U.S.C., sec. 1364 (a)), is amended to read as follows:

"The Tariff Commission shall immediately make public its findings and recommendations to the President, including any dissenting or

separate findings and recommendations, and shall cause a summary thereof to be published in the Federal Register."

SEC. 6. (a) Subsection (b) of section 7 of the Trade Agreements Extension Act of 1951, as amended (19 U.S.C., sec. 1364 (b)), is amended by adding at the end thereof the following: "Increased imports, either actual or relative, shall be considered as the cause or threat of serious injury to the domestic industry producing like or directly competitive products when the Commission finds that such increased imports have contributed substantially towards causing or threatening serious injury to such industry."

(b) Section 7 of the Trade Agreements Extension Act of 1951, as amended (19 U.S.C., sec. 1364), is amended by adding at the end thereof the following new subsection:

"(c) As used in this Act, the terms 'domestic industry producing like or directly competitive products' and 'domestic industry producing like or directly competitive articles' mean that portion or subdivision of the producing organizations' manufacturing, assembling, processing, extracting, growing, or otherwise producing like or directly competitive products or articles in commercial quantities. In applying the preceding sentence, the Commission shall (so far as practicable) distinguish or separate the operations of the producing organizations involving the like or directly competitive products or articles referred to in such sentence from the operations of such organizations involving other products or articles."

The importer contends, and the Customs Court found, that the assessed rate on the imported bicycles was illegal because the rate proclaimed was not recommended by the Tariff Commission.

The importer also contends and the Customs Court found that even if it be found that the rate proclaimed

for the imported bicycles is legal the entire proclamation is invalid for the reason that the procedural requirements with respect to the investigation and time limit within which the President must act were violated. The importer based that contention upon the following allegations: First, the investigation by the Tariff Commission was not completed within nine months; second, no public hearings were held in connection with the supplementary investigation; and, finally, the President issued the Proclamation more than sixty days after submission of the findings and recommendations by the Tariff Commission.

It is appellant's position that the Customs Court was in error because the procedural requirements of the statute were met and because the modification of the rate of duty on the imported bicycles was an act within the authority delegated to the President.

The procedural questions turning on the time limits provided in section 7(a), while not free from doubt and ambiguity as regards the request of the President to the Tariff Commission for supplemental information and the subsequent supplemental report of the Tariff Commission, which had the practical effect here of enlarging the times provided in section 7(a), should, we think, be resolved in favor of appellant's contentions. The President's report of May 11, 1955, was submitted within the sixty-day period specified in sections 7(a) and 7(c) to the Chairmen of the specified committees of both the Senate and the House, and the report of the Tariff Commission had been submitted to the President within the nine months time period specified in section 7(a).

Thus, Congress was fully and timely notified as to the steps being taken and could, had it desired so to do, have taken independent action as envisaged at the

time of the enactment of section 7 of the Trade Agreements Extension Act of 1951.

As pointed out in appellant's brief:

> * * * Congress has kept the administration of the escape-clause procedure of Section 7 of Trade Agreements Act of 1951 under close scrutiny. And the legislative history of each of three extension acts which have been enacted since 1951 evinces not only a careful supervision of the practice of the President and the Tariff Commission under Section 7, but also, and more importantly, a clear congressional approval of the interpretation of the President and the Commission that Section 7 permits supplementary inquiries to be conducted without regard to its procedural requirements.

In considering H.R. 1, the bill which became the Trade Agreements Extension Act of 1955, the 84th Congress was fully apprised of the procedure the President and the Tariff Commission had followed in requesting and conducting supplemental investigations in at least three prior investigations under the "escape-clause" provisions of the existing law. In reporting this bill, the House Committee on Ways and Means noted that:

> The committee gave extensive consideration to amendments to the escape-clause provisions of existing law, but decided that it was neither necessary nor desirable to change the law. [H. Rept. No. 50, 84th Cong., 1st Sess., p. 4]

As one result of this extensive consideration and despite "the expressed concern from many quarters over the administration of the escape clause," the Committee indicated its approval of the administrative procedures such as were here adopted to secure supplemental information in a section 7 proceeding, as follows:

> The committee believes that the President should give full consideration to the Tariff Commission's findings regarding injury. If he believes that these findings should be further developed, or if new information relevant to such findings are disclosed, in the committee's opinion *he should continue his practice of submitting such data to the Tariff Commission for supplemental investigation and findings where appropriate.* [Emphasis added.]

Similarly, a study of the past operation of section 7, as administered by the President and the Tariff Commission, was made by Congress before enactment of the Trade Agreements Extension Act of 1958, 72 Stat. 673. While section 7 was again amended in several respects, including a shortening of the nine-month time limit to six months, no disapproval of the prior administrative practice was evidenced either in the committee reports, or by changes in the text of the statute itself.

In these circumstances, we think Congress must be deemed to have approved and, in effect, ratified this prior administrative interpretation and application. As this court held in a related context:

> * * * Both the House of Representatives and the Senate, after lengthy hearings and full consideration, and with knowledge of the President's interpretation of the Trade Agreements Act, have continued to extend the President's power to enter into trade agreements, and have continued to make appropriations to carry on this function. This action by Congress amounts to legislative approval of the President's action * * *. Therefore it seems plain that Congress intended to authorize the President to do what he has done in the instant case; * * *. [*Greene Cattle Co.* v. *United States*, 36 C.C.P.A. (Customs) 52, 60, C.A.D. 397.]

We conclude, therefore, that the procedural aspects leading up to the promulgation of Presidential Proclamation No. 3108 were conducted in compliance with section 7 of the Trade Agreements Extension Act of 1951, as amended, as that section was interpreted and administered by the President and the Tariff Commission with the knowledge of Congress and with what we find amounted to Congressional assent to this procedure.

The remaining issue is whether, in fixing a rate of duty different from that recommended by the Tariff Commission on one class of bicycles the President acted outside the authority granted to him under section 7 of the Trade Agreements Extension Act of 1951, as amended.

Appellee contended and the Customs Court found that the proclamation with respect to the large wheel lightweight bicycles was outside the authorization given by the statute in that it proclaimed an adjustment in the rate of duty other than that recommended by the Tariff Commission. The specific language of the statute pertinent to this issue is, "the President may make *such adjustments in rates of duty*, * * * as *are found and reported by the Commission* to be necessary to prevent or remedy serious injury * * *." [Emphasis added.] The clear import of this language is that the President *may* proclaim adjustments in rate of duty, but he need not do so. The alternative of disregarding the recommendation and making no changes in existing rates is open to the President. However, if the President decides to make an adjustment in rate of duty, he must proclaim the change which is recommended to him by the Tariff Commission.

Appellant correctly emphasizes that section 7 of the Trade Agreements Extension Act of 1951 is primarily a procedural statute. This statute, commonly referred to as the "escape-clause" provision,[1] defines the manner in which the President must exercise existing powers.

Congress has fixed in section 7 of the Trade Agreements Extension Act of 1951 the limits on the Presidential exercise of the therein delegated powers. He is authorized only to accept or reject the recommendations of the Tariff Commission made pursuant to this section. Were it otherwise, the procedures set up in section 7 would be meaningless. For this reason, we do not agree with the position of counsel for appellant that Congress, in addition, intended that the President should have greater discretion and authority under other statutes to achieve the same objectives. Be that as it may, we know of no other statutory provisions by which the President may effect

[1] The "escape-clause" is a clause inserted in trade agreements allowing parties to the agreement to escape from terms of the agreement which cause or threaten serious injury to domestic industry, which effect was unforeseen at the time of the agreement. The statutory procedure may be applied only in cases where the involved trade agreement contains such an "escape-clause." In this case the escape clause involved is that in GATT, 61 Stat. (Part 5) A59.

The first treaty containing an escape clause was the Mexican trade agreement of 1943. In 1947, Executive Order 9832, 12 Fed. Reg. 1363, declared that every subsequent trade agreement to which the United States is a party must contain an escape clause, and the Order prescribed a procedure whereby the escape clause could be invoked on behalf of American domestic industries.

"escape-clause" adjustments and counsel have cited none.[2]

Counsel for appellant have suggested that the President could avoid the "escape-clause" proceedings under section 7 and accomplish the same end by negotiating new terms with foreign nations. This argument overlooks the necessity of involving the peril-point procedures of sections 3 and 4 of the Trade Agreements Extension Act of 1951, as amended. Subsections 3(a)(2) require a special investigation of articles over which there will be negotiations, and which require additional import restrictions to prevent or remedy serious injury to domestic industry. Subsection 4(a)(2) requires the President to report to Congress, specifically identifying the articles subject to a subsection 3(a)(2) investigation, where the recommendations of the Tariff Commission have not been carried out, stating his reason for not carrying out the recommendations. Such a report would then open the way for "escape-clause" action to be initiated by Congress, or for such other action as Congress deems appropriate.

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[2] Counsel for appellant argued that a restrictive construction of the statute which allows the President only the alternative of proclaiming the modifications recommended or of disregarding the recommendations limits the powers of the President and that this cannot be done by a procedural statute. This argument ignores the fact that section 7 establishes a particular proceeding for a particular purpose and does not affect any powers granted under other applicable statutes. The President, under section 7 is granted the right to proclaim any restriction within the limits set by Congress, or not to proclaim any new restriction at all. If anything else is done, it must be done according to some other statutory authorizaion and under the procedure there specified.

Counsel for appellant also argue that under section 350(a) the President might terminate the previous proclamation at any time. However, we fail to see how this has any bearing upon the argument. The power to terminate his own proclamation can grant no greater discretion to the President than that under which adjustments are proclaimed. The question is one of authority delegated by Congress within the clearly expressed limitations of section 7.

When the Trade Agreements Act of 1951, as amended, is examined as a whole, in light of its expressed purposes, instead of being viewed as a series of disconnected, individual provisions, the reasonableness of providing that the President may either proclaim or refuse to proclaim the adjustments the Tariff Commission recommends is apparent. Congress delegated authority to establish import restrictions by international agreement in order to expand foreign trade. However, the intent to expand foreign trade was motivated by the desire to promote the domestic economy. 19 U.S.C. 1651(1)(a). In order to assure protection for domestic industries, Congress enacted the peril-point procedure of sections 3 and 4 of the Trade Agreements Act of 1951, as amended, requiring a thorough investigation of the articles to be considered in negotiation of an agreement and a report of the investigation prior to the negotiations to inform the Executive departments as to the minimum restrictions which can safely be considered. However, the negotiators retain full discretion, within the limits set by Congress, to agree to any restrictions which they deem best. As described above, special procedures are provided with respect to articles requiring greater protection.

In the event that the extensive proceedings prior to the negotiations fail to provide the minimum neces-

sary protection for domestic industry, Congress provided the "escape-clause" procedures of section 7 to insure correction of the deficiencies in tariff protection. The "escape-clause" provisions of section 7 provide the means by which domestic industry can be protected by executive action. Failure here would be a breakdown of the system of effectuating legislative objectives through specific delegation of authority to the more flexible and specialized administrative and executive agencies, leaving resort only to the pre-1934 procedure of direct legislative action by Congress.

Viewing the Trade Agreements Extension Act of 1951 as a whole, or looking only to section 7 thereof, we are unable to discern any anomalous results from a construction of the language which leaves to the President only the alternatives of proclaiming the recommendations of the Tariff Commission or of refusing to do so. Nor is there any ambiguity in the language of the statute on this point. Our conclusion on this point finds further support in the extrinsic evidence of legislative intent.

Prior to enactment of the first "escape-clause" procedure in the Trade Agreements Extension Act of 1951, 65 Stat. 72, the procedure for invoking the escape-clause was set forth in Executive Order 9832, 12 Fed. Reg. 1363.[3] The Executive Order procedure made the recommendations of the Tariff Commission subjects for the President's consideration but the ultimate action was left entirely to the discretion of

[3] Executive Order 9832, 12 Fed. Reg. 1363, was superceded by Executive Order No. 10004, 13 Fed. Reg. 5851, which in turn was superceded by Executive Order No. 10082, 14 Fed. Reg. 6105, but no changes pertinent here were made in the procedure.

the President. However, Congress found that procedure to be unfair, ineffective, and unworkable.[4] Two amendments were introduced in the House, one by Mr. Curtis, which would have enacted the existing procedure,[5] and one by Mr. Bailey, which made the recommendations of the Tariff Commission binding upon the President.[6] Mr. Curtis' amendment was rejected, and Mr. Bailey's amendment was passed by the House.[7]

The Senate Finance Committee redrafted the "escape-clause" procedure into substantially its present form.[8] This form of procedure was a compromise, in that it did not bind the President to proclaim every recommendation. However, it did not give the President discretion to proclaim any other modification.[9] With some amendments not pertinent here, the Senate Finance Committee amendment was reported out of Conference Committee and passed by Congress.

In the Trade Agreement Extension Acts of 1953 and 1955 substantially the same language is found. In each of those years, however, Congress again rejected amendments which would have made the recommendations of the Tariff Commission binding upon the President,[10] and also rejected amendments which

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[4] H. Rep. No. 14, January 29, 1951, 82d Cong., pp. 22–23, 97 Cong. Rec. 807, 818–821, 835; 1075–1076.

[5] 97 Cong. Rec. 1075.

[6] 97 Cong. Rec. 1233.

[7] 97 Cong. Rec. 1081; for text of Bailey Amendment see 97 Cong. Rec. 1233.

[8] 97 Cong. Rec. 5493.

[9] See S. Rep. No. 299, 82 Cong., 1st Sess., U.S.C. Cong. and Admin. Service, 1951, Vol. 2, pp. 1467–1468, and 97 Cong. Rec. 5494–5496.

[10] In 1953 H.R. 5496; 101 Cong. Rec. 5562, 5621 (5627).

would have left the President the same discretion as he had prior to 1951.[11]

Neither the committee reports nor the Congressional debates show any Congressional intent that the President should be authorized to proclaim rates other than those recommended by the Tariff Commission. To the contrary, the legislative history indicates that the President may either proclaim what is recommended, or disregard the report of the Tariff Commission altogether.[12] The objective to be achieved by enacting the procedure set forth in section 7 is to restrict arbitrary exercise of the President's powers,[13] and yet to provide through executive action adequate protection for domestic industries.[14] The objectives were to be achieved through the procedures expressly stated in section 7 for limiting the President in the exercise of his powers thereunder.

The powers of the President with respect to trade agreements are delegated to him by Congress under its Constitutional powers.[15] It requires no elaborate argument to support the proposition that Congress in so delegating its powers may prescribe whatever procedures and limitations it sees fit to enact for limiting the exercise by its agents of such delegated powers.

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[11] 99 Cong. Rec. 7922.

[12] 97 Cong. Rec. 5494-5496; 99 Cong. Rec. 6535 6536, 6554, 7871; 101 Cong. Rec. 1727 et seq., 8169 et seq. S. Rept. No. 472, 83 Cong., 1st Sess.; U.S.C. Cong. & Admin. News, 1953, p. 2187.

[13] 97 Cong. Rec. 5495-6.

[14] 97 Cong. Rec. 807-821, 1075-1081, 5494 et seq.

[15] *Star-Kist Foods, Inc. v. The United States (Bruno Scheidt, Inc., Party in Interest)*, 47 CCPA 52, C.A.D. 728, and authority cited therein.

The language of section 7 of the Trade Agreements Extension Act of 1951, as amended, is clear and unambiguous. The legal result which is contemplated by the plain meaning of the language of the statute appears to be reasonable and consistent with the overall purposes expressed in other sections of the Act.

As we have shown above, the legislative history of the "escape-clause" procedure supports the plain meaning of the language used in the statute. We hold, therefore, that insofar as Presidential Proclamation No. 3018 sets a rate of duty on the class of bicycles here in issue other than that recommended by the Tariff Commission, it exceeds the authority delegated to the President and such portion of the proclamation is void.

The judgment of the Customs Court is *affirmed*.

Affirmed.

MARTIN, *J.* was not present at the hearing and did not participate in the decision.

WORLEY, *Chief Judge*, concurring.

In my opinion the record clearly supports the holding of the Customs Court that the procedure followed by the President did not comply with the requirements of Section 7(a) of the Trade Agreements Extension Act of 1951. I would affirm the judgment in its entirety.

United States Court of Customs and Patent Appeals

Wednesday, July 20, 1960

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 20th day of July, A.D. 1960.

Present the Honorable Eugene Worley, Chief Judge, and the Honorables Giles S. Rich and Arthur M. Smith, Associate Judges, and the Honorable William H. Kirkpatrick, United States Senior Judge for the Eastern District of Pennsylvania.

The court was opened for business in due form.

THE UNITED STATES, APPELLANT

v.

SCHMIDT PRITCHARD & Co., MAXGANO CYCLES Co., APPELLEES

Customs Appeal No. 4980

Said appeal having heretofore been brought on to be heard before the court, and due consideration thereon having been had, it is—

ORDERED that the judgment of the United States Customs Court be, and the same is hereby, affirmed.

APPENDIX B

1. Section 350 of the Tariff Act of 1930, as added by the Reciprocal Tariff Act of 1934, 48 Stat. 943, as amended, 19 U.S.C. 1351, provides in pertinent part as follows:

> (a)(1) * * * the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—
>
> (A) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; * * *
>
> (B) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

2. Section 7 of the Trade Agreements Extension Act of 1951, 65 Stat. 74, as amended by Section 1(g) of the Trade Agreements Extension Act of 1953, 67 Stat. 472, 19 U.S.C. (1952 ed., Supp. I) 1364, provides as follows:

> (a) Upon the request of the President, upon resolution of either House of Congress, upon resolution of either the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives, upon its own motion, or upon application of any

terested party, the United States Tariff Commission shall promptly make an investigation and make a report thereon not later than nine months after the application is made to determine whether any product upon which a concession has been granted under a trade agreement is, as a result, in whole or in part, of the duty or other customs treatment reflecting such concession, being imported into the United States in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive products.

In the course of any such investigation, whenever it finds evidence of serious injury or threat of serious injury or whenever so directed by resolution of either the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives, the Tariff Commission shall hold hearings giving reasonable public notice thereof and shall afford reasonable opportunity for interested parties to be present, to produce evidence, and to be heard at such hearings.

Should the Tariff Commission find, as the result of its investigation and hearings, that a product on which a concession has been granted is, as a result, in whole or in part, of the duty or other customs treatment reflecting such concession, being imported in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive products, it shall recommend to the President the withdrawal or modification of the concession, its suspension in whole or in part, or the establishment of import quotas, to the extent and for the time necessary to prevent or remedy such injury. Within sixty days, or sooner if the President has taken action under subsection (c) of this section, the Tariff Commission shall transmit to the Committee on Finance of the

Senate and the Committee on Ways and Means of the House of Representatives an exact copy of its report and recommendations to the President.

(b) In arriving at a determination in the foregoing procedure the Tariff Commission, without excluding other factors, shall take into consideration a downward trend of production, employment, prices, profits, or wages in the domestic industry concerned, or a decline in sales, an increase in imports, either actual or relative to domestic production, a higher or growing inventory, or a decline in the proportion of the domestic market supplied by domestic producers.

(c) Upon receipt of the Tariff Commission's report of its investigation and hearings, the President may make such adjustments in the rates of duty, impose such quotas, or make such other modifications as are found and reported by the Commission to be necessary to prevent or remedy serious injury to the respective domestic industry. If the President does not take such action within sixty days he shall immediately submit a report to the Committee on Ways and Means of the House and to the Committee on Finance of the Senate stating why he has not made such adjustments or modifications, or imposed such quotas.

(d) When in the judgment of the Tariff Commission no sufficient reason exists for a recommendation to the President that a concession should be withdrawn or modified or a quota established, it shall make and publish a report stating its findings and conclusions.

3. Section 5 of the Trade Agreements Extension Act of 1955, 69 Stat. 166, provides in pertinent part as follows:

The last sentence of subsection (a) of section 7 of the Trade Agreements Extension Act of 1951, as amended (19 U.S.C., sec. 1364(a)), is amended to read as follows: "The Tariff Commission shall immediately make public its findings and recommendations to the President, including any dissenting or separate findings and recommendations, and shall cause a summary thereof to be published in the Federal Register".

4. The Trade Agreements Extension Act of 1958, 72 Stat. 676, provides in pertinent part as follows:

SEC. 5. * * *

* * * The first paragraph of section 7(a) of such Act is amended by striking out "nine months" and inserting in lieu thereof "six months".

* * * * *

SEC. 6. Subsection (c) of section 7 of the Trade Agreements Extension Act of 1951, as amended (19 U.S.C., sec. 1364(c)), is amended by inserting "(1)" after "(c)" at the beginning thereof, and by adding at the end thereof the following:

"(2) The action so found and reported by the Commission to be necessary shall take effect (as provided in the first sentence of paragraph (1) or in paragraph (3), as the case may be)—

"(A) if approved by the President, or

"(B) if disapproved by the President in whole or in part, upon the adoption by both Houses of the Congress (within the 60-day period following the date on which the report referred to in the second sentence of paragraph (1) is submitted to such committees), by the yeas and nays by a two-thirds vote of each House, of a concurrent resolution stating in effect that the Senate and House of Representatives approve the action so found and reported by the Commission to be necessary.

For the purposes of subparagraph (B), in the computation of the 60-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or an adjournment of the Congress sine die.

"(3) In any case in which the contingency set forth in paragraph (2)(B) occurs, the President shall (within 15 days after the adoption of such resolution) take such action as may be necessary to make the adjustments, impose the quotas, or make such other modifications as were found and reported by the Commission to be necessary."

5. Proclamation No. 3108 (August 18, 1955), 70 Stat. C4, 90 Treas. Dec. 285, T.D. 53883, provides as follows:

1. Whereas, under the authority vested in him by the Constitution and the statutes, including section 350(a) of the Tariff Act of 1930, as amended, the President on October 30, 1947, entered into a trade agreement with certain foreign countries, which trade agreement consists of the General Agreements on Tariffs and Trade and the related Protocol of Provisional Application thereof, together with the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (61 Stat. (Parts 5 and 6) A7, A11, and A2059), and, by Proclamation No. 2761A of December 16, 1947 (61 Stat. 1103), proclaimed such modifications of existing duties and other import restrictions of the United States and such continuance of existing

ing customs or excise treatment of articles imported into the United States as were then found to be required or appropriate to carry out the said trade agreement on and after January 1, 1948;

2. Whereas item 371 (First) in Part I of Geneva-Schedule XX annexed to the said General Agreement (61 Stat. (Part 5) A1213) reads as follows:

Tariff Act of 1930, par. or par.	Descriptions of products	Rates of duty
371	Bicycles, with or without tires, having wheels in diameter (measured to the outer circumference of the tire):	
	Over 26 inches, if weighing less than 36 pounds complete without accessories and not designed for use with tires having a cross section diameter exceeding 2 inches	[illegible]
	Other	[illegible]
	Over 19 but not over 26 inches	[illegible]
	Not over 19 inches	[illegible]

3. Whereas, in accordance with Article II of the said General Agreement and by virtue of the said Proclamation No. 2761A, the United States customs treatment of the products described in the said item 371 (First) is the application to such products of the rates of duty specified in the column designated "Rate of Duty" in the said item 371 (First), which treatment reflects the concessions granted in the said General Agreement with respect to such products.

4. Whereas the United States Tariff Commission has submitted to me its report of an investigation, including a hearing, under section 7 of the Trade Agreements Extension Act of 1951, as amended (65 Stat. 72; 67 Stat. 472), on the basis of which it has found that the products described in the said item 371 (First) are, as a result in part of the duties reflecting the concessions granted thereon in the said General Agreement, being imported into the United States in such increased quantities as to cause serious injury to the domestic industry producing like or directly competitive products;

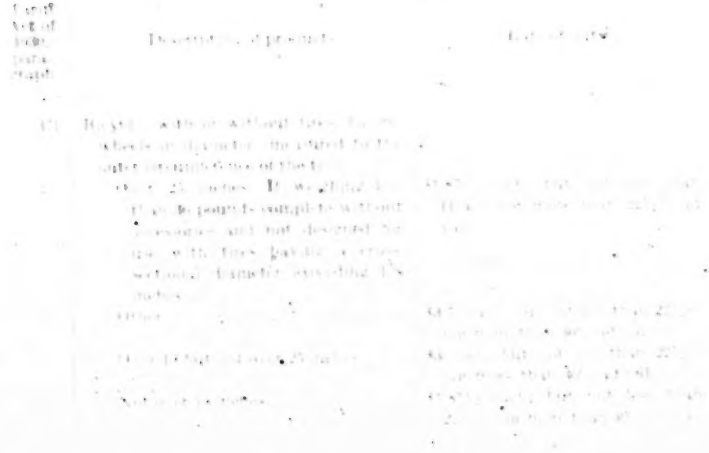
5. Whereas section 350(a) of the Tariff Act of 1930, as amended, authorizes the President to proclaim such modifications of existing duties as are required or appropriate to carry out any foreign trade agreement that the President has entered into under the said section 350(a); and

6. Whereas I find that the modification of the concessions granted in the said General Agreement with respect to the products described in the said item 371 (First) to permit the application to such product of the duties hereinafter proclaimed is necessary to remedy the serious injury to the domestic industry producing like or directly competitive products, and that upon such modification of the concessions it will be appropriate to carry out the said General Agreement, including Article XIX thereof, to apply to the said products the rates of duty hereinafter proclaimed:

Now, therefore, I, Dwight D. Eisenhower, President of the United States of America, acting under the authority vested in me by section 350 of the Tariff Act of 1930, as

amended, and by section 7(c) of the Trade Agreements Extension Act of 1951, and in accordance with the provisions of Article XIX of the said General Agreement, do proclaim—

(a) That the said item 371 (First) shall be modified, effective after the close of business August 18, 1955, to read as follows:



(b) That the products described in the said item 371 (First), as modified by paragraph (a) above, entered, or withdrawn from warehouse, for consumption after the close of business August 18, 1955, and until the President otherwise proclaims, shall be subject to the rates of duty specified in such modified item 371 (First).

Proclamation No. 2761A of December 16, 1947, as amended, is modified accordingly.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this eighteenth day of August in the year of our

Lord nineteen hundred and fifty-five, and of the Independence of the United States of America the one hundred and eightieth.

[SEAL] DWIGHT D. EISENHOWER.

By the President:

JOHN FOSTER DULLES,

Secretary of State.

LE COPY

Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 490

UNITED STATES OF AMERICA, PETITIONER,

v.

SCHMIDT PRITCHARD & CO., MANGANO CYCLES CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR SCHMIDT PRITCHARD & CO., MANGANO CYCLES CO., IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 490

UNITED STATES OF AMERICA, PETITIONER,

v.

SCHMIDT PRITCHARD & CO., MANGANO CYCLES CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

BRIEF FOR SCHMIDT PRITCHARD & CO., MANGANO CYCLES CO., IN OPPOSITION

Opinions Below

The opinion of the United States Customs Court is reported at 41 Cust. Ct. 108, C. D. 2029, 167 Fed. Supp. 272 (R. 39-67).[1] The opinion of the United States Court of Customs and Patent Appeals (Pet. 27-45) is reported at Treasury Decisions Volume 95, Advance Sheets No. 38, September 22, 1960, page 34, C.A.D. 750.

[1] "R" herein refers to the Transcript of Record in the United States Court of Customs and Patent Appeals.

Jurisdiction

The judgment of the United States Court of Customs and Patent Appeals was entered on July 20, 1960 (Pet. 44-45). The petition for writ of certiorari was filed on October 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1256.[1]

Question Presented

Whether the customs duty imposed on certain imported bicycles was illegally assessed pursuant to Presidential Proclamation No. 3108 of August 18, 1955 for failure of the President and the Tariff Commission to comply with express limitations of the governing statute, Section 7 of the Trade Agreements Extension Act of 1951, as amended.

Statutes and Proclamations Involved

Presidential Proclamation No. 3108,[2] and pertinent portions of Section 7 of the Trade Agreements Extension Act of 1951,[3] and amendments thereto, as well as portions of Section 350 of the Tariff Act of 1930,[4] and amendments thereto are set forth in Appendix B to the petition herein (Pet. 46-54). Pertinent provisions of Sections 3 and 4 of the Trade Agreements Extension Act of 1951[5] and Section 2 of the Trade Agreements Extension Act of 1954,[6] as amended by the Trade Agreements Extension Act of 1955[7] are set forth in Appendix A hereto at pages 21, 22.

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[1] All citations herein to U.S.C. refer to the 1952 edition.

[2] 70 Stat. C4; Exhibit 5 (R. 33).

[3] 65 Stat. 74, 19 U.S.C. § 1364.

[4] The Trade Agreements Act of 1934, 48 Stat. 943, as amended, 19 U.S.C. § 1351.

[5] 65 Stat. 72, 73, 19 U.S.C. §§ 1360, 1361.

[6] 68 Stat. 360.

[7] 69 Stat. 166, § 7, 19 U.S.C., Supp. III, § 1352a.

Statement

Certain imported bicycles involved herein were assessed for duty at 11¼% ad valorem under Paragraph 371, Tariff Act of 1930,[1] as modified by Presidential Proclamation No. 3108 of August 18, 1955.

Respondents initiated this action in the United States Customs Court by a protest filed under Section 514, Tariff Act of 1930,[2] as amended, claiming that said duty of 11¼% was illegally assessed because Proclamation No. 3108 purporting to give effect to such rate was illegal for failure to comply with specific limitations of Section 7, Trade Agreements Extension Act of 1951, as amended, the so-called escape clause, and that the involved bicycles were properly dutiable at 7½% ad valorem under said Paragraph 371 as modified by Proclamation No. 2761-A.[3] The relevant facts are undisputed.

On June 14, 1954 application was filed with the Tariff Commission requesting an investigation with respect to bicycles under said Section 7, Trade Agreements Extension Act of 1951, as amended. Exhibit 1 (R. 21).

On June 22, 1954 the Commission instituted a formal investigation under said Section 7, of which due public notice was given and in the course of which a public hearing was held. Exhibits 1, 2 (R. 21, 26).

On March 14, 1955, the Commission submitted a "Report to the President on Escape Clause Investigation No. 37 Under the Provisions of Section 7 of the Trade Agreements Extension Act of 1951," recommending specific increases in duties applicable to bicycles. Exhibit 3 (R. 29).

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[1] 46 Stat. 625, 19 U.S.C. § 1001, Par. 371.

[2] 46 Stat. 734, 19 U.S.C. § 1514.

[3] 61 Stat. (Part 2) 1103

On May 11, 1955, the President requested the Commission to consider certain specific questions and report thereon to him no later than July 15, 1955 (Exhibits 1(IV)(7), 2(c)). On the same date the President wrote to the Chairmen of the Committee on Ways and Means, House of Representatives and Committee on Finance, United States Senate, advising that he was remanding the case to the Commission for further information (R. 36).

On July 14, 1955 the Tariff Commission submitted a "Supplementary Report to the President on Escape Clause Investigation No. 37 Under the Provisions of Section 7 of the Trade Agreements Extension Act of 1951". Exhibit 4. No public notice was issued and no public hearing held in connection with the "supplemental" investigation. Collective Exhibit 2 (R. 26).

On August 18, 1955 the President issued Proclamation No. 3108 increasing the duties on bicycles, reciting that he was doing so "under the authority vested in me by Section 350 of the Tariff Act of 1930, as amended, and by Section 7(c) of the Trade Agreements Extension Act of 1951, and in accordance with the provisions of Article XIX of the said General Agreement" on Tariffs and Trade.[1] Exhibit 5. On all types except large wheel lightweight bicycles, the President approved and proclaimed the increased rates recommended to him by the Tariff Commission. On large wheel lightweight bicycles the President proclaimed a different rate found by him.

On the same date that Proclamation No. 3108 was issued, the President wrote identical letters to the Chairmen of the Committee on Finance, United States Senate, and the Committee on Ways and Means, House of Representatives, explaining his action, Exhibit 5 (R. 33). Said letters stated that "in 'escape clause' cases such as this" considerations in addition to injury and relief to a domestic

[1] 61 Stat. (Part 5) A58.

industry are involved—that while, under the law—Section 7 of the Trade Agreements Extension Act—"the conditions for relief there established have been met", American bicycles are not directly competitive with the imported large wheel lightweight, and the different action taken by the President would, therefore, recognize "in a measure the indirect competition which the American product may be experiencing from the imported large wheel light weight".

Decision of the United States Customs Court

The United States Customs Court sustained respondents' protest and held Presidential Proclamation No. 3108 invalid on two principal grounds.

First, the court unanimously held that the Tariff Commission investigation was illegal (a) for lack of public notice and hearing as required by the law, if the supplemental inquiry be considered a new investigation, or (b) because not concluded within the 9 month period fixed by said Section 7, if the supplemental inquiry be considered as an extension of the investigation instituted on June 22, 1954.

Secondly, the court held (one member dissenting) that the President had exceeded the statutory powers delegated to him by the Congress in proclaiming a rate of duty different from that recommended to him by the Commission on large wheel lightweight bicycles.

In view of its holding the Customs Court found it unnecessary to pass upon the further contention advanced by respondents that Proclamation No. 3108 was invalid because based "on a finding by the President that the products covered thereby are not like or directly competitive with the American product in violation of the express limitation of law restricting changes in duties to 'like or directly competitive' products" (R. 57-58). The court also apparently found it unnecessary to pass on the further con-

tention that the statute, Section 7(c) authorized the President to issue his proclamation only within 60 days of the March 14, 1955 report of the Commission and that his attempt to do so after the expiration of that period was illegal (R. 45).

Decision of the Court of Customs and Patent Appeals

The Court of Customs and Patent Appeals unanimously affirmed the holding by the Customs Court that Congress has fixed in Section 7 of the Trade Agreements Extension Act of 1951 a limitation on the Presidential exercise of the therein delegated powers and that the President is authorized only to accept or reject recommendations of the Tariff Commission made pursuant to this Section. "Were it otherwise", said the court, "the procedures set up in Section 7 would be meaningless" (Pet. 38). The court, however, disagreed with the Customs Court on the validity of the investigation by the Tariff Commission.[1]

Argument

The basic issue involved herein is neither novel nor of current general importance. The lower court's decision follows holdings by this Court and is consistent with its own prior decisions in the tariff delegation field. The decision of the court below, guided by its expertise in the field of customs and tariff law, is correct and gives effect to the plain meaning of the unambiguous language of the involved statute and the intention of the Congress.

1—*The issue herein is not novel.* Delegation by Congress to designated agents of some of its basic powers under Article 1, Section 8 of the Constitution, to lay and

[1] Worley, Chief Judge, was of opinion that the record also clearly supported the holding of the Customs Court that the procedure followed in the investigation did not comply with the statute.

collect duties and regulate commerce with foreign nations, limited by specific standards, has been long established. *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394. That the standards prescribed by the legislature in such delegation must be complied with is equally well established. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 318; cf. *Morgan* v. *United States*, 298 U. S. 468, 479.

Section 7 of the Trade Agreements Extension Act of 1951, as amended, represents such a delegation by Congress to the President and the Tariff Commission, accompanied by clear and specific limitations or "yardsticks" that any investigation by the Commission shall be completed promptly and within 9 months; that adequate public notice shall be given of any such investigation; that findings and recommendations to prevent injury shall be transmitted by the Commission to the President, and that upon receipt of the Tariff Commission report, the President may much such changes in duty "as are found and reported by the Commission." These requirements were not complied with in this case.

No treaty, trade agreement or other international obligation of the United States is directly involved; the President's power to enter into foreign trade agreements remains unchanged, and the proper exercise by the President of his power over "foreign affairs"[1] is not impaired by the decision of the lower court.

The issue herein involves application of well established rules of statutory construction to a domestic statute and

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[1] *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, involved power of the President "in respect of a matter intended to affect a situation in foreign territory" (*idem*, 321), wholly unconnected with the fixing of rates of duty on imports into the United States. That case does not hold or intimate that the President may act contrary to an act of Congress in an area where the Congress is constitutionally supreme.

relates directly only to the validity of an attempted change in import duty on a single commodity. The effect of this isolated action is no different than the continual and continuing changes in duty on many different imported commodities as a result of judicial or administrative construction of the tariff laws.

2. *The issue herein is not of sufficient importance to warrant review by this Court.* An insignificant fraction of total imports into the United States is affected by this action. Of the thousands of commodities on which concessions in duties have been granted in trade agreements concluded to date,[1] and hence, subject to possible escape clause action, the lower court's decision covers one class of bicycles only.

Petitioner contends that the necessary result of such holding would invalidate not only Proclamation No. 3136 but also three others and throw doubt upon the validity of a fourth. Two of the proclamations referred to, namely, 3059 (68 Stat. (Part 2) C44) and 3100 (69 Stat. C31[illegible] concerning alsike clover seed, have by their terms long since expired and no similar proclamation on this commodity presently in effect. Proclamation No. 3211 (22 Fed. Reg. 9943) concerning spring clothes pins and Proclamation No. 3257 (23 Fed. Reg. 7475) concerning lead and zinc [illegible] upon special facts unique to each case. Also, Proclamation No. 3257 was issued after substantial amendments to the statute by the Trade Agreements Extension Act of 1958.[2]

The 1958 amendments referred to create further serious doubt that the case at bar is of any current importance.

[1] Concessions in trade agreements in effect on January 1, 1953, for example, accounted for 93.4 percent of total dutiable imports in 1952. *Effect of Trade Agreement Concessions on United States Tariff Levels Based on Imports in 1952*, United States Tariff Commission, September, 1953, at page 3.

[2] 72 Stat. 673.

If these amendments to the law three years after Proclamation No. 3108 was issued, be construed to constitute a specific expression of broad power in the President under said Section 7(c), as contended by petitioner (Pet. 25), the result must be to render the earlier law and actions taken thereunder, academic.

There has been no long continued uniform administrative practice by the President entitled to any weight in the construction of the involved statute and his interpretation of the statute was challenged almost immediately. Cf. *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 498; *Higgins* v. *Commissioner*, 312 U. S. 212, 216.[1]

3—*The decision of the court below is clearly correct.* The court below concluded in part (Pet. 43-44):

> "The powers of the President with respect to trade agreements are delegated to him by Congress under its Constitutional powers. It requires no elaborate argument to support the proposition that Congress in so delegating its powers may prescribe whatever procedures and limitations it sees fit to enact for limiting the exercise by its agents of such delegated powers.
>
> "The language of section 7 of the Trade Agreements Extension Act of 1951, as amended, is clear and unambiguous. The legal result which is contemplated by the plain meaning of the language of the statute appears to be reasonable and consistent with the overall purposes expressed in other sections of the Act."

This holding is in accord with decisions by this Court hereinbefore referred to (*supra*, p. 7) in *Hampton* v.

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[1] Furthermore, the alleged administrative practice contended for by petitioner is so flatly at variance with the plain meaning of Section 7, that even if it existed it would not be controlling on this Court. *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 750; *India* v. *United States*, 270 U. S. 245, 251.

United States and *Norwegian Nitrogen Products Co.* v. *United States*.:

The holding of the lower court is also consistent with prior decisions of that court in construing the so-called flexible tariff act, Section 336 of the Tariff Act of 1930, the statutory plan of which bears striking similarity to Section 7 of the Trade Agreements Extension Act of 1951. Thus, the provision in said Section 336(c), providing that

> "the President shall by proclamation approve the rates of duty * * * specified in any report of the [Tariff] commission under this section, if in his judgment such rates of duty * * * are * * * necessary * * *"

was held to limit the President to *approval* or *disapproval* of the rates specified by the Commission in its report. *Feltex Corp.* v. *Dutchess Hat Works*, 21 CCPA 463; *United States* v. *Best & Co.*, 24 CCPA 220. Said decisions gave full effect to the Conference Report on H. R. 2667, the Tariff Bill of 1930, which stated in part that under the above-quoted provisions "the President may not modify a rate, classification, or basis of value so specified by the Commission."[2]

Petitioner suggests that Section 350(a) of the Tariff Act of 1930 is the basic statute vesting "substantive" power in the President to change import duties under the trade agreements program, while Section 7 of the Trade Agreements Extension Act of 1951 is merely "procedural". Section 350 deals with authority of the President to enter *into* trade agreements with foreign countries, and to proclaim modification of existing tariff duties to *carry out* any such foreign trade agreement. The powers thus delegated are carefully delineated and limited, doubtless, to keep the trade agreements statute within the constitutional boundaries outlined by this Court in *Hampton* v. *United*

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[1] 46 Stat. 701, 19 U.S.C. § 1336.

[2] H. Rept. No. 1803, 71st Cong., 2nd Sess., pages 28-29.

States, supra.[1] Similarly, in enacting in Section 7 the statutory provision for "escape" from any modification in duty proclaimed by the President under Section 350, the Congress prescribed limitations for the same purpose.

Whatever powers may have been delegated to the President by the Congress under said Section 350,[2] which it is not necessary here to decide, any action taken by the President *for the purposes of said Section 7* is clearly controlled by the limitations and standards precisely set forth by Congress in that later, more specific provision of law. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208, and cases cited therein. The "plenary discretion" asserted by petitioner (Pet. 23) cannot be found in the face of this specific later action by the Congress, and the lower court correctly so held.

4—*The holding by the Court below is in full accord with the legislative intention.* The language of Section 7(c) of the Trade Agreements Extension Act of 1951, as amended, is clear and unambiguous and the plain meaning of the words used by the Congress accords fully with the construction by the Court below. Legislative history of the section, furthermore, if properly invoked, supports such plain meaning.

Prior to enactment of a statutory escape clause in the Trade Agreement Extension Act of 1951, escape action from trade agreement concessions rested entirely upon Executive Orders 9832 of February 25, 1947 (12 Fed. Reg. 1363), 10004 of October 5, 1948 (13 Fed. Reg. 5851) and 10082 of October 5, 1949 (14 Fed. Reg. 6105, 15 Fed. Reg. 601) in which the President invested himself with broad discretion.

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[1] See H. Rept. No. 1000, 73d Cong., 2nd Sess., on H. R. 8687 the Trade Agreements Bill of 1934, at p. 11.

[2] Cf. *United States* v. *Metropolitan Petroleum Corp.*, 42 C.C.P.A. 8, *cert. den.* 348 U. S. 858; *United States* v. *American Bitumuls & Asp. Co.*, 44 C.C.P.A. 193, 240 F. 2d 270, *cert. den.* 355 U. S. 883

The procedures thereby established provided for investigation by the Tariff Commission and its report and recommendation to the President "for his consideration in the light of the public interest."

In 1951, a bill, H. R. 1612, limited to extension of the Trade Agreements Act was reported to the House of Representatives by the Committee on Ways and Means. The bill was vigorously attacked for failure to include therein standards to regulate escape action.[1]

An amendment to H. R. 1612 by Congressman Curtis to incorporate escape clause standards by vesting authority in the President to take such action "as he deemed necessary" was offered and withdrawn[2] in favor of an amendment by Congressman Bailey providing for investigation, report and recommendation by the Tariff Commission to the President, but containing no provision for action by the President, which was adopted by the House of Representatives.[3]

The Senate Committee on Finance redrafted the escape clause provisions and added Section 7(c) defining action by the President in the same form as enacted and in force when the proclamation here involved was issued. In reporting the bill, the Committee said in part:

"It is the construction of this committee that . . .

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[1] See H. Rept. No. 14, 82nd Cong., 1st Sess., pp. 20, 22-24; remarks of Congressmen Mills, 97 Cong. Rec. 820, 827; Reed, pp. 800, 807; Seely-Brown, *idem* pp. 818, 819; Martin, *idem* pp. 856, 857, and Bailey, *idem* pp. 835 and 1049.

[2] *Idem*, pp. 1070, 1076.

[3] *Idem*, pp. 1074, 1077, 1081, 1233 (as corrected). A provision in the Bailey amendment limiting operation of escape clause action to commodities included in a trade agreement containing an escape clause within the agreement, as did Executive Orders 9832 [illegible] and 10082, was eliminated in conference.

escape action taken, shall be administered under the procedures provided in section 7 of this bill."[1]

As finally enacted H. R. 1612 retained the Senate provisions with no substantial changes.[2]

The holding of the court below is further supported by other provisions of the law in *pari materia* with Section 7 of the Trade Agreements Extension Act of 1951, namely, the so-called "peril point" provisions of Sections 3 and 4 of the Trade Agreements Extension Act of 1951, and the so-called "national security" provisions of the trade agreements statute, as amended by the Trade Agreements Extension Act of 1955.[3]

Section 3 of the Trade Agreements Extension Act of 1951, as enacted, provides that prior to entering into any negotiations for trade agreements under Section 350 of the Tariff Act of 1930, the Tariff Commission shall investigate

[1] Sen. Rept. No. 280, 82nd Cong., 1st Sess., p. 6.

[2] Conference Report on H. R. 1612, H. Rept. No. 537, 82nd Cong., 1st Sess., p. 4. The provisions of Section 7 (re defining the President's power in escape clause actions, adopted as above-quoted in 1951, have remained unchanged, although in 1953, 1954 and 1955 Congress acted to extend the power of the President to enter into trade agreements under Section 350 and adopted various changes in that law as well as to sections pertaining to general operation of the escape clause. One such change affecting escape clause action, adopted in 1953, provided that if the Commission was divided into two equal groups, each of which was unanimous, the President might consider either of the two sets of findings or recommendations as the findings or recommendations of the Commission. Trade Agreements Extension Act of 1953, § 201, 67 Stat. 472, 19 U.S.C., Supp. III, § 1330.) Had it been the intention to permit the President to disregard findings or recommendations of the Commission and to proclaim different rates, this amendment to the law would seem to have been useless.

[3] 19 U.S.C., § 1360, 1361; see Appendix V hereto for pertinent provisions.

[4] 19 U.S.C., Supp. III, § 1352a; see Appendix V for pertinent provisions.

articles to be considered and report to the President its findings as to the limit to which modifications in duty may be made without causing injury, or whether an increase in duty or other import restriction is required to avoid injury. The statute further provides, however, in Section 4 (19 U.S.C. § 1354), that the President may *enter into a trade agreement which may exceed the limit found and reported by the Tariff Commission, or fail to reserve or make appropriate the minimum increase in duty reported by the Commission as required to avoid such injury.*[1] By this section, therefore, the Congress has given express *authority* to the President to take positive action at variance with the "peril point" findings of the Commission.

The "national security" amendment to the law adopted in 1955, provides that whenever any article is being imported in such quantities as to threaten or impair national security, and after investigation and report to him of the findings and recommendations made in connection therewith, the President

> . . . . shall *take such action as he deems necessary*

(Emphasis added.)

Significantly, the words above emphasized "as he deems necessary", were included in the escape clause amendment offered by Congressman Curtis during consideration of the Trade Agreements Extension Act of 1951. As heretofore noted,[2] said amendment was dropped and the Congress enacted the very specific language found in present law.

The foregoing makes clear that when Congress intends to give discretion to the President to take action as he *deems necessary* by way of modifying duties on imports, it used clear and specific language to express such intention. The equally clear and specific language of Section of the Trade Agreements Extension Act of 1951, however

[1] *Ibid.*, § 1352a (b).

[2] *Supra*, p. 12 n. 2.

completely negates any idea that the Congress had any intention to, or did, in fact, confer on the President anything but limited power to accept or reject "such" findings and recommendations "as are found and reported" by the Commission. The attempt by the President to substitute new findings and a new and different rate of duty was therefore illegal, and the lower court correctly so held.

Collateral Questions Argued in Petition

The petition herein presents a number of arguments on matters believed to be collateral to the basic issue involved here.

Petitioner refers to Article XIX of the General Agreement on Tariffs and Trade as further alleged authority for the President to modify tariff concessions through escape action, separate and apart from the provisions of said Section 7.

The General Agreement on Tariffs and Trade (GATT) is a provisional agreement only.[1] Furthermore, the Congress, in amending and continuing its delegation of power to the President in trade agreement legislation has since 1951 included a provision as follows:[2]

> The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade.

[1] *See, e.g.*, page 4.

[1] Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. (Part 6) A2051. See Commission on Foreign Economic Policy: *Staff Papers*, p. 270, and *Report to the President and the Congress*, p. 4 (1954).

[2] Trade Agreements Extension Act of 1951, § 10 (19 U.S.C. § 1364); Trade Agreements Extension Act of 1953, § 103; Trade Agreements Extension Act of 1954, § 3; Trade Agreements Extension Act of 1955, § 3(a); Trade Agreements Extension Act of 1958, § 10.

Article XIX of GATT can hardly be asserted to vest powers in the President superior to those embodied in the later specific legislative enactment of said Section 7.

Petitioner contends that the Court below has ignored the so-called essentially different roles of the President and the Tariff Commission under the escape clause—that under Section 7 the Commission may consider only injury to a domestic industry while the scope of the President's inquiry is much broader and includes a number of general factors. This contention ignores the fact that Section 7 establishes a particular proceeding for a particular purpose only, namely, to prevent or remedy injury to a domestic industry.

Undoubtedly, the President weighs many factors in arriving at a decision. Clearly, however, his *decision* is limited by the statutory language to accepting or rejecting "such" recommendations "as are found and reported by the Commission."

The suggestion that the effect of the decision below is to vest the Commission "with authority to control the nation's foreign relations and over-all national interests" (Pet. 22) is completely unsound. In making its findings and recommendations, the Commission acts under Section 7 in accordance with its historic function as a fact finding body. As an agent of the Congress, it gives expression to the clearly expressed will of Congress by placing before the President findings and recommendations to prevent injury to a domestic industry for his optional acceptance or rejection. It does not, and cannot, of course, dictate to or control action by the President—*any more than it can or does under the flexible tariff, Section 336 of the Tariff Act. Supra*, p. 10.

The President retains the same discretionary power which he possesses with respect to any proposed law or legislation placed before him by the Congress. He weighs many factors and may accept or reject. If he accepts

the findings of the Commission, his action is equivalent to approval of a law passed by the Congress. If he rejects the findings of the Commission his action is equivalent to a veto.

Petitioner asserts (Pet. 16, 17) that in consideration of the 1955 Trade Agreements Extension Act, the House Ways and Means Committee confirmed a construction of the law that the President was intended by Congress to have full discretion to accept, reject or modify the Commission's recommendations. The report of the Committee cited in this connection does not support said allegation.[1]

Petitioner refers further (Pet. 24) to a report of a sub-committee on "Customs, Tariffs and Reciprocal Trade Agreements" issued *in 1957*[2] which, it is asserted, sets forth a construction of the 1951 law for which petitioner here contends. Actually that report at page 74 under the heading "Scope of Presidential discretion with respect to the 'escape clause'" states in part:

> "The President is given the discretion to accept or reject the Commission's recommendations."

That the subcommittee report referred to was not intended to present any considered conclusions or recommendations, however, is made clear in the body thereof.[3]

Petitioner further asserts (Pet. 25) that the alleged construction of law by the House subcommittee above referred to was reconfirmed in the House Committee Report on H. R. 12591, 85th Cong., 2nd Sess., which was enacted as

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[1] H. Rept. No. 50, 84th Cong., 1st Sess.

[2] *Report to the Committee on Ways and Means on United States Customs, Tariff, and Trade Agreement Laws and the Administration, from the Subcommittee on Customs, Tariffs and Reciprocal Trade Agreements*, 1957.

[3] See Comment on cover page and on page iv of report, *supra*

the Trade Agreements Extension Act of 1958, and that Congress as a whole considers this interpretation to be correct as is now apparent on the face of the present statute. Study of the Committee report referred to discloses no reference which may fairly be said to constitute confirmation, approval or otherwise of the alleged power in the President. On the contrary, an exactly opposite conclusion may fairly be drawn. See H. Rept. No. 1761, 85th Cong., 2nd Sess., pp. 10 *et seq.*

The 1958 Extension Law *made no change in* the provisions of *Section 7(c) defining* the power of the President to act on Commission recommendations.[1] Congress merely *added* a *new* provision establishing specific procedures for review and action by the Congress in instances where the President might *thereafter* disapprove a Tariff Commission recommendation "in whole or in part".[2] Petitioner argues that by this 1958 amendment Congress was "reconfirming" (Pet. 25) the President's action under the law in one unspecified instance 3 years earlier. Had such been the intention of the Congress, it would surely have used language more carefully calculated to accomplish that result. "The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S. 304, 313.

It should be noted here that the power of the President to enter into trade agreements was originally limited to a period of 3 years.[3] That power of the President has been extended from time to time; the latest such extension having been made in 1958 and expiring in 1962.[4] In most of such extensions amendments to the statute further defined and limited the powers delegated to the President. Section

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[1] Trade Agreements Extension Act of 1958, § 9.

[2] *Ibid.*

[3] Trade Agreements Act of 1934, § 2(c).

[4] 1958 Extension Act, § 2.

7, however, was enacted without any time limitation and is permanent legislation. Congress has never been called upon to re-enact or extend that specific provision of law. Accordingly, no basis exists for invoking any alleged Congressional adoption of administrative construction and the cases cited by petitioner (Pet. 23) in this regard have no bearing here.

The legislative history of the 1958 Extension Act discloses nothing to indicate that Congress considered it was codifying any construction of the pre-existing law. That statutes should be given prospective effect only, in the absence of clear contrary legislative intention, is settled law. *Russell* v. *United States*, 278 U. S. 181, 187-188; *Haggar Co.* v. *Helvering*, 308 U. S. 389, 398-400. In the latter case this Court said in part (*idem*, p. 400):

> "If we are to draw inferences it would seem as probable that Congress was content to leave the problems of the past to be solved by the courts where they were then pending, rather than to preclude their solution there. Action so ambiguous in its implications as to the past is wanting in that certainty and evident purpose which would justify its acceptance as a legislative declaration of what an earlier Congress had intended rather than an effort to make clear that which had been rendered dubious by unwarranted administrative construction."

If consideration may properly be given to an amendment to the law adopted by the Congress in 1958, 3 years after the proclamation in question was issued, and 7 years after the governing statute was enacted, the proper rule applicable would seem to be that the deliberate addition of new language indicates a change of meaning was intended. *Crook County* v. *Sober*, 318 U. S. 705, 714.

The 1958 amendment to the escape clause provision in question, like the adoption of a statutory escape clause in

copy of such agreement together with a message accurately identifying the article with respect to which such limits or minimum requirements are not complied with, and stating his reasons for the action taken with respect to such article * * *.

2. The "national security" provisions of the Trade Agreements Extension Act of 1954, 68 Stat. 360, § 2, as amended by the Trade Agreements Extension Act of 1955, 69 Stat. 166, § 7 (19 U.S.C., Supp. III, § 1352(a)):

Sec. 2. (a) No action shall be taken pursuant to such section 350 to decrease the duty on any article if the President finds that such reduction would threaten domestic production needed for projected national defense requirements.

(b) In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.